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No. 80-888

In the Supreme Court of the United States

OCTOBER TERM, 1980

JAMES D. ROWBOTHAM, *Petitioner*

vs.

AMERICAN AIRLINES, INC., et al., *Respondents*

Brief of American Airlines, Inc., Allied Pilots Assoc., and All Other Non-Federal Respondents in Opposition

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OPINIONS BELOW

The decision of the Court of Appeals, appended to the Petition, is unpublished, 628 F.2d 1357, and, as such, is not precedent in the Ninth Circuit. 9th Cir. R. 21(a) and (c).

STATEMENT OF CASE[1]

On October 5, 1973, Dr. L. G. Lederer, Medical Director of American Airlines, Inc. ("American"), sent petitioner James D. Rowbotham, then employed as a co-pilot for American, a certified letter informing him in no uncertain terms that he was

> ". . . permanently disqualified from flying status because of a convulsive brain disorder."

1. The case is restated here as petitioner's statement contains many inaccuracies.

(Lederer Deposition, Ex. 60.) The letter went on to state:

> "As you may recall, after preliminary examination by Dr. Budington and reports from the Sequoia Hospital, dated May 23, 1973, and my own examination of you and your history on June 7, 1973, we came to the conclusion that you had a medical condition which was incompatible with the safe operation of aircraft. It was further our opinion that this medical condition is permanent and needs medication for control."

(Lederer Deposition, Ex. 60.)

The Collective Bargaining Agreement then in effect between American and the Allied Pilots Association ("Allied") specifically provided in Section 26(D) that if American determined a pilot was medically disqualified from flying, *the pilot* could

> ". . . employ a qualified medical examiner of his own choosing and at his own expense for the purpose of conducting a physical examination for the same purpose as the physical examination made by the medical examiner employed by the Company."

(C.R. (1) 95, 96.)[2] And, if the medical examiner[3] retained by the pilot verified the findings of American's medical examiner, "no further medical review of the case shall be afforded." (C.R. (1) 96.) In the event the findings disagreed

> ". . . the Company will *at the written request of the employee* ask that the two (2) medical examiners agree upon and appoint a third (3rd) qualified and disinterested medical examiner, preferably a specialist for the purpose of making a further physical examination of the employee.

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2. "C.R. (1) ....." means Clerk's Record of District Court Case No. 77-0667 CFP which record was before the Ninth Circuit. "C.R. (2) ....." means Clerk's Record of District Court Case No. 76-2265 CFP which record was before the Ninth Circuit.

3. By "medical examiner" is meant any "aviation medical examiner" specifically designated by the FAA. 14 CFR § 67.23 and Section 26(B) of the Agreement. (C.R. (1) 95.)

> "The . . . disinterested medical examiner shall then make a further examination of the pilot . . . and the case *shall be settled on the basis of his findings.*"[4]

(C.R. (1) 96.)

Petitioner never used this direct and simple procedure to resolve the question of his fitness to fly for American. Rather, he has continually avoided the question and, acting as his own doctor and lawyer, has thrashed about in numerous lawsuits which have had no discernible purpose other than the harassment of American, Allied, the Federal Aviation Administration ("FAA"), and the multitude of individuals employed by these various organizations.

Petitioner did file a grievance on a number of issues pursuant to Section 29 of the Collective Bargaining Agreement, which grievance was heard by the American Airlines Pilots' System Board of Adjustment ("Adjustment Board") on March 27, May 14 and 15, 1974.[5]

He submitted nine separate demands to the Adjustment Board (A.B. Tr. Vol. II 136-140) and, when questioned whether he had any other demands, he responded by stating:

> "I think a notation might be made of the contract violations that I allege. And they have been made by Mr. Fisher."

(A.B. Tr. Vol. II 140:7-10.)[6]

Mr. Fisher is Charles W. Fisher, Esq., an attorney for Allied employed to handle grievances of pilots. (Fisher Deposition, 6:5-

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4. All emphasis is added unless otherwise indicated.

5. American is a carrier by air within the meaning of Section 201 of the Railway Labor Act, 45 U.S.C. § 181, *et seq.* American's Adjustment Board has been established pursuant to the mandatory requirements of 45 U.S.C. § 184 for the resolution of minor disputes between American, its employees and Allied. The Adjustment Board is composed of four members: two from American and two from Allied. All majority decisions of the Adjustment Board are *final* and binding. If the Board deadlocks on an issue, a neutral arbitrator is selected to resolve the dispute. See Sections 28 and 29 of the Agreement.

6. "A.B. Tr. ....." means the transcript of Adjustment Board hearing.

22.) Fisher represented petitioner throughout the grievance procedure. The contract violations referred to by petitioner were those set forth by Fisher in his opening remarks before the Adjustment Board. (A.B. Tr. Vol. II 37-40.)

On October 8, 1974, the Adjustment Board rendered a nine-page memorandum of decision wherein it found that eight of petitioner's demands had been complied with or were without the scope of the Collective Bargaining Agreement. On the issue of full coverage under a new life insurance policy, the Adjustment Board deadlocked. That issue was taken to arbitration by Allied and was resolved in petitioner's favor.

On petitioner's grievance demand for a letter from American stating that he could return to fly for American within five years after the end of his sick leave if he was fit, the Adjustment Board made this finding:

> "[Supplement F of the Collective Bargaining Agrement] provides that a pilot who is receiving disability payment and subsequently recovers his health may return to flying, if he recovers within 5 years of the expiration of his paid sick leave. Therefore, the Board finds the grievant's demand redundant and there is no contractual provision requiring a letter from the Vice President of Flight."

In other words, in order to obtain reinstatement as a pilot for American, all petitioner had to do was to demonstrate that he had recovered his health within 5 years and was again qualified to fly. This is exactly what Section 26(D) of the Collective Bargaining Agreement (the mechanism whereby a pilot may challenge his medical disqualification) is designed to do. And, it is exactly that mechanism petitioner never used.

On October 12, 1976 appellant filed a complaint, *in propria persona,* in the United States District Court for the Northern District of California against the Adjustment Board seeking to set aside its decision of October 8, 1974, because of, *inter alia,* fraud and corruption and various procedural irregularities.

On April 1, 1977, appellant, again acting *in propria persona,* filed a second complaint. That complaint was 94 pages in length and prayed for damages totalling 116 million dollars. On May 13, 1977 appellant filed a sixteen page amendment to his complaint seeking an additional 30 million dollars in damages and naming a number of individuals employed by the FAA.

A motion to dismiss and for summary judgment was filed in the second action; judgment was entered for all respondents on August 10, 1977. Cross-motions for summary judgment were filed in the Adjustment Board case, judgment was entered for American in that action on December 14, 1977. An appeal followed and on September 8, 1980, the Ninth Circuit affirmed the judgments of the district court.

ARGUMENT

A. The Court Below Fully Considered and Correctly Decided the Issues.

As a result of respondent Allied's efforts on petitioner's behalf, the Adjustment Board found that petitioner had a contractual right to return to flying status if he recovered from his disability within 5 years.

Such a result is in full accord with the principles set forth in *Union Pacific R. Co. v. Sheehan,* 439 U.S. 89 (1978), and *Vaca v. Sipes,* 386 U.S. 171 (1967).

B. The Unpublished Memorandum Below in No Way Conflicts with the Decisions of This Court or the Courts of Appeal.

It is well settled that a petition for a writ of certiorari will not be granted

> ". . . except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal."

Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955), *quoting Layne & Bowler Corp. v. Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

Certainly, an unpublished memorandum of decision which is without precedent, 9th Cir. R. 21(a) and (c), does not create a ". . . real and embarrassing conflict of opinion and authority . . ." warranting review by this Court.

But, even if the Ninth Circuit had published its decision, petitioner has failed to demonstrate any conflict whatsoever, let alone the existence of a dispute involving principles of public concern. All that the petition demonstrates is that "petitioner believes" the courts below erred in their reading of the record. And, this brings us to our third argument.

C. The Court Does Not Grant Certiorari to Review Evidence and Discuss Specific Facts.

Petitioner has asked this Court to decide whether there are any genuine issues of material fact in dispute which would operate to defeat summary judgment. The Court is simply not in that business:

> "We do not grant a certiorari to review evidence and discuss specific facts."

United States v. Johnston, 268 U.S. 220, 227 (1925). In *Graver Mfg. Co. v. Linde Co.,* 336 U.S. 271, 275 (1949), the Court stated:

> ". . . a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."

Here, there is simply no such error. The mere assertion that a dispute of material fact exists does not create such a dispute. Indeed, petitioner himself asserted in the district court below in

the action challenging the decision of the Adjustment Board that there were no material facts in dispute: He filed a cross-motion for summary judgment and argued there were no material facts in dispute. We do not believe he can now be heard to argue otherwise.

CONCLUSION

The petition should not be granted.

Respectfully submitted,

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